

Black v. DJO Global, Inc.

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WHY IT MADE THE LIST

One sign that an author has risen from fame to legend is when the author's works are so widely known and remembered that they shift from stories to symbols, tales to metaphors. Hans Christian Andersen's *The Emperor's New Clothes* is a case in point. Published in Copenhagen in 1837 as a short, thirty-five paragraph children's fairy tale, this iconic story has been entertaining youngsters and adults the world over for nearly two centuries.

It tells of two swindlers who one day come into an emperor's town and spread word that they are great weavers, able to make "uncommonly fine" fabrics that are invisible to those "unfit" for public office or "unusually stupid." Enticed by how handy such a fabric could be in culling the unfit from his government, the emperor commissions the swindlers to weave him a garment from this special fabric. He is persuaded to supply the swindlers with all manner of expensive silks and threads, which they steal, all the while working in plain sight, night and day, on empty looms pretending to weave. The emperor's emissaries inspect the progress and, fearful of being revealed as "unfit" or "unusually stupid," verify that the cloth, its patterns, and its colors left them "spellbound." When he is finally dressed in his new, nonexistent garments, the emperor's own self-doubt overtakes him and he, too, pronounces the clothes "magnificent." In a procession through the streets in his new outfit, the townsfolk fall in with the delusion: "Oh, how fine are the Emperor's new clothes! Don't they fit him to perfection?" And on it went. Until a little child shouted out: "But he hasn't got anything on!" Nonplussed, the emperor kept parading.¹

Among the countless messages imparted by this disarming little parable is about the insidious nature of willful ignorance. Inertial forces have often led minds to choose to go along with what is untrue or wrongheaded simply because it was widely championed or emphatically pitched. As Hans Christian Andersen cautioned, it takes the innocence of an unencumbered mind or the confidence of sound convictions to resist that tide.

Resistance was at issue in *Black v. DJO Global, Inc.*² The litigation involved a products liability claim for manufacturing defect. There was no corroborating expert opinion. Instead, the plaintiff proposed to rely on the seductive-sounding "malfunction theory" to carry her proof burden. Her injury (second-degree burn from a medical device) was indisputable. But a skin burn was a known, labeled risk of this medical

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¹ See Jean Hersholt, *The Emperor's New Clothes—A Translation of Hans Christian Andersen's Keiserens Nye Klæder*, THE HANS CHRISTIAN ANDERSEN CENTRE, https://andersen.sdu.dk/vaerk/hersholt/TheEmperorsNewClothes_e.html.

² 488 P.3d 1283 (Idaho 2021).

product. Could the “malfunction theory” still play a role in that sort of case—to prove that the product had, indeed, malfunctioned and consequently had to have been defectively assembled? The Idaho Supreme Court’s unanimous ruling addressing that query ranks it among the top food and drug cases of 2021.

DISCUSSION

Linda Black suffered second-degree burns while a licensed physical therapist was performing electrical stimulation therapy on her back. That treatment had been intended to offer her pain relief, reduce inflammation, increase blood flow, and aid in tissue healing. Ms. Black alleged that her burns occurred due to a defect in the self-adhesive carbon electrode pads used during this electrical stimulation treatment. The source for that allegation was her treating physical therapist. He testified that Ms. Black had received the same electrical stimulation therapy three prior times without incident, that he had performed this type of therapy uneventfully many thousands of times before doing so on Ms. Black, and that on only three earlier occasions had he observed treatment burns and those all involved electrode pads made by the same manufacturer and drawn from the same production batch.³ A products liability lawsuit was filed against the manufacturer, DJO Global, Inc., in Idaho State Court. Ms. Black’s litigating theory was that something went awry during the manufacture of this particular batch of electrode pads, and that snafu had introduced what turned out to be an injury-causing product defect.

Discovery followed, including interrogatories, production requests, and the depositions of both Ms. Black and the treating therapist.⁴ It was learned that the very same electrode pads that had been used uneventfully on Ms. Black during her three prior therapies were the ones also now accused of being defective.⁵ Those pads had been thrown away by the therapist’s office staff and, thus, were not available to be inspected by either the manufacturer or a technical expert.⁶ It was also learned that the treating physical therapist lacked the experience or knowledge needed to opine as to the proper design or manufacture of self-adhesive carbon electrode pads.⁷ The therapist had, however, been trained on how to visually inspect electrode pads for defectiveness (“the wire starts to become pulled out of the carbon portion of the pad and kind of puckers and dimples”); he observed none of those visual irregularities with Ms. Black’s pads.⁸

The therapist described the manner of Ms. Black’s injury-triggering therapy session. After satisfying himself that the patient’s back was “clean and ready for treatment,” the therapist applied the electrode pads directly to Ms. Black’s skin—without placing a “moistened interface,” like a cloth or sponge, between the electrode

³ See *id.* at 1284–87.

⁴ See Brief for Appellee at 7, *Black v. DJO Global, Inc.*, 488 P.3d 1283 (Idaho 2021) (No. 47812-2020), 2020 WL 5625637, at 4 [hereinafter, “Appellee Brief”].

⁵ See Brief for Appellant at 7, *Black v. DJO Global, Inc.*, 488 P.3d 1283 (Idaho 2021) (No. 47812-2020), 2020 WL 4195938, at 4.

⁶ See *Black*, 488 P.3d at 1287.

⁷ See Appellee Brief, *supra* note 4, at 6 & 10.

⁸ See *id.* at 10–12.

pads and the patient's skin.⁹ The user's manual for the electrotherapy device had specifically instructed otherwise ("When using carbon electrodes with any Rich-Mar stimulator, a moistened interface (cloth or sponge) **MUST** be utilized between these electrodes and patient *to avoid skin irritation and/or electrical burns.*").¹⁰ The therapist also recalled setting the electrotherapy device to its highest current setting, 50 milliamperes (mA), for Ms. Black's last therapy session—which also, counseled the user's manual, required heightened care and occasional repositioning of the pad locations ("When using this device at current outputs above 40mA, extra caution should be observed *to avoid burns* by using an adequate conductive medium and by frequently using an alternate electrode placement.").¹¹ The user's manual had also noted that "skin irritation and burns beneath the electrodes have been reported with the use of muscle stimulators."¹²

Towards the end of the treatment session, the therapist noticed a white spot on the patient's back which, to the therapist, appeared to be a burn. Because Ms. Black reported no preexisting issues with her skin and seemed unconcerned with what the therapist was observing, the therapy session continued on, finished, and Ms. Black departed. When her skin became red and inflamed two hours later, Ms. Black returned to the therapist and was directed to seek a physician's care. She was subsequently diagnosed with second-degree burns to her back.¹³

Ms. Black first proposed to have her therapist offer an expert opinion that the burns were caused by a manufacturing defect in the electrode pads. That proffer was refused; the trial judge ruled that the therapist lacked the foundation necessary to render such an expert opinion. Ms. Black offered no other, independent expert to corroborate the therapist's surmise, perhaps because the essential evidence needed to construct that opinion (i.e., the pad used with Ms. Black) had been thrown away.

Left without expert proofs, Ms. Black proposed instead to invoke Idaho's "malfunction theory," which should, she insisted, create a prima facie manufacturing defect case solely on the basis of the therapist's recounting of events and his long, prior burn-free history of performing this type of electrical stimulation therapy. The Idaho Supreme Court described its state's "malfunction theory" as an indirect, circumstantial path for proving a product's defectiveness—it requires evidence that the product in question malfunctioned, combined with a lack of evidence of any reasonable, secondary cause for the claimed injury (such as abnormal use or some other cause that could exculpate the product supplier).¹⁴ The court explained that, under those conditions, the "malfunction theory" can fairly carry the burden of circumstantially establishing a manufacturing defect in a product because "a product

⁹ See *Black*, 488 P.3d at 1284.

¹⁰ See Appellee Brief, *supra* note 4, at 12–14 (capitalization in original; italics added).

¹¹ See *id.* (italics added).

¹² See *Black*, 488 P.3d at 1288.

¹³ See *id.* at 1284–85.

¹⁴ See *id.* at 1287. This formulation aligns with the one crafted for the Third Restatement of Torts. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 (1998) ("It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff: (a) was of a kind that ordinarily occurs as a result of product defect; and (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.").

will not ordinarily malfunction within the reasonable contemplation of the consumer in the absence of a defect.”¹⁵

Both the trial judge and, later, the Idaho Supreme Court rejected Ms. Black’s attempted use of the “malfunction theory.” That theory, wrote the unanimous Supreme Court, is “a common sense rule that enables plaintiffs to bring a claim for a product defect where the product is no longer available or a specific defect cannot be identified.” But applying it in Ms. Black’s case, explained the court, “would stretch the theory to its logical breaking point” because the injury she suffered was “the precise type of injury” known to result from electrical stimulation theory. “This fact precludes a jury from inferring that ‘an injury would not have occurred . . . had there not been a defect attributable to the manufacturer.’”¹⁶

IMPACT

The arc of products liability is fascinating. Setting aside its fits and starts, the progress and the regressions, from antiquity through the medieval period,¹⁷ products liability by the early 1600s seemed sadly mired in buyer-beware. The law charged the consumer to inspect thoroughly before buying a product, and if the consumer failed to check, failed to check thoroughly, or failed to uncover the product’s flaws, he or she was just plain out of luck if injured later (absent proof of a breach of an express warranty or scienter-based deceit).¹⁸ During this age, it did not matter how insistently the product purveyor had promoted the goods, or how undiscoverably the product’s defect had lurked: “An affirmation, no matter how many holy saints were invoked, fell short of a warranty; latent defects, however impervious to ordinary vision, were the purchaser’s own lookout.”¹⁹

Rightful dissatisfaction with this state of affairs coaxed product theory away from its twin anchors in contract and intentional tort, and into the sphere of ordinary care. But even there, problems of proof and trailing vestiges of warranty principles encumbered the field. In an influential concurrence in a case that allowed a waitress to recover when a bottle of Coke exploded in her hand, then-California associate justice Roger Traynor mused that even negligence seemed too constraining a requirement and ought to be replaced by “absolute liability” when a product injures a consumer.²⁰

“Absolute” liability? Yikes. Backyard barbeques need to be hot to cook, knives need to be sharp to cut, and unpopped kernels are always a tooth-chipping threat in your family room. Peanuts and milk are actually deadly to those with peanut allergies and severe lactose intolerance. Even water, an essential ingredient to life, can leave you drowned. Berkeley Law’s dean and tort scholar William Prosser made the point sprightly: “A good many individuals are allergic to strawberries and eggs. That doesn’t

¹⁵ See *Black*, 488 P.3d at 1287.

¹⁶ See *id.* at 1288.

¹⁷ Which is not to say that this epoch of the arc is uninteresting. See generally DAVID G. OWEN, *PRODUCTS LIABILITY LAW* § 1.2 (3d ed. 2015).

¹⁸ See *id.*

¹⁹ *Id.* at 15–16 (quoting Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 *YALE L.J.* 1133, 1169 (1931)).

²⁰ *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 461 (Cal. 1944) (Traynor, J., concurring).

mean that there is anything wrong with the food. There is something wrong with the individual.”²¹ Thus, product + injury = liability was too facile an equation.

From this revelation emerged the notion of “defectiveness” as a necessary prerequisite for product-based liability.²² Liability follows only upon proof of defectiveness, or, adopting Dean Prosser’s memorable phrasing, there needs to be “something wrong” with the product. And from here, strict liability’s Section 402A and “defective-condition-unreasonably-dangerous-to-the-user” principles arrived.²³ Even California’s trend-setting Justice (soon-to-be Chief Justice) Traynor was persuaded: “A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, *proves to have a defect* that causes injury to a human being.”²⁴ Liability was to be “strict,” but only when the product proved to have a “defect.” The law had thus journeyed far from “buyer-beware” to nearly its polar opposite.

But practical, sometimes insurmountable hurdles continued to vex the injured consumer. What if the defectively mounted steering column in the car had been destroyed in the ensuing crash? What if the poorly seated rubber gasket on the gas heater had been incinerated in the ensuing fire? What if the shattered fragments of the exploded Coke bottle were swept up and tossed in the garbage? What if it is impossible to know what failed, how it failed, and what caused it to fail?

Solving for these challenges was to be the role of the “malfunction theory.” When a product had malfunctioned (e.g., the car stopped steering, the heater’s leaking gas detonated, the bottle disintegrated while being lifted onto a grocer’s shelf), a manufacturing defect might be presumable from the very fact of the malfunction.²⁵ Assuming misuse and other possible causes could be ruled out, there *had to have been* something wrong during the product’s manufacture because, as designed, a car will steer, a heater’s gas will stay contained, and a bottle will be lifted without incident. If those things didn’t happen, it plainly was not a problem with the product’s design. Something went wrong during production. We might not know what, but a latent defect of some sort had been introduced into that particular car, that particular heater,

²¹ See DAVID G. OWEN & MARY J. DAVIS, PRODUCTS LIABILITY AND SAFETY 267 (8th ed. 2020) (quoting 38 ALI PROCEEDINGS 55 (1961)).

²² Absent the obvious historic exceptions of breach of warranty or fraud.

²³ See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

²⁴ *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1963) (italics added). See also *id.* at 901 (“To establish the manufacturer’s liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used *as a result of a defect* in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.”) (italics added).

²⁵ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmt. b (1998) (“When a product unit contains [a manufacturing defect], and the defect affects product performance so as to cause a harmful incident, in most instances it will cause the product to malfunction in such a way that the inference of product defect is clear. From this perspective, manufacturing defects cause products to fail to perform their manifestly intended functions.”).

or that particular bottle.²⁶ And, as between the product’s purveyor and the consumer, the former ought to bear the risk of the resulting loss.²⁷

The “malfunction theory” hinges irreducibly on a malfunction occurring. That’s more than just the theory’s namesake; it is its logical bedrock. A malfunction of a product supplies proof of the “something wrong” essential to product liability *because* that malfunction is only explainable in a properly used, properly designed product if some snafu occurred during production (e.g., some bolt wasn’t completely tightened, some tube wasn’t securely attached, some flap wasn’t totally glued down).²⁸ “[T]he very purpose of the malfunction doctrine is to allow a plaintiff to prove a case by circumstantial evidence when a product *clearly fails* but there simply is no direct evidence of precisely how or why it did so.”²⁹ Put another way, for the “malfunction theory” to work, the product must have provably failed.

Were the self-adhesive carbon electrode pads used on Ms. Black on the day of her burn injury defectively manufactured? Did those pads “fail”? No one can know for certain. They were thrown out and could not be inspected. Ms. Black offered no expert to opine on defective manufacture: no medical analysis of the type, shape, size, prominence, or severity of her burn; no testing of this batch and that batch of electrode pads to assess their uniformity; no laboratory attempt to recreate the injury choreography. Instead, Ms. Black rested her claim on the inference of defectiveness that the law allows to arise once a product is proven to have malfunctioned. Ms. Black’s problem, however, was lack of proof of a malfunction.

Three attributes make *Black v. DJO Global* especially noteworthy. First, Ms. Black’s litigating position shows how incanting “malfunction theory” can almost subliminally invite the law to skip past that theory’s indispensable first element—the happening of a malfunction. Suffering a burn while undergoing electrical stimulation therapy is indisputable proof of an injury. On first glance, that might seem like enough. After all, a patient should not get burned during a therapy session, right? Similarly alluring is the suggestion, expressed or implied, that the “malfunction theory” can somehow be used to prove (or infer) the happening of a malfunction. (A bit like trusting in beautifully weaved, but oddly invisible “clothes.”)

Both are legal errors. Proof of injury is not also proof of malfunction.³⁰ Conflating the two turns *strict* products liability into *absolute* products liability, something the law has steadfastly rejected. Similarly, the “malfunction theory” cannot be invoked to raise an inference of malfunction. To the contrary, a product’s malfunction is the

²⁶ See *id.* at cmt. c (“The inference of defect may be drawn under [the “malfunction theory”] without proof of the specific defect. Furthermore, quite apart from the question of what type of defect was involved, the plaintiff need not explain specifically what constituent part of the product failed.”).

²⁷ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998) (rationale for strict liability in manufacturing defect cases). See generally *Greenman*, 377 P.2d at 901 (“The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”).

²⁸ See *Farmer v. Int’l Harvester Co.*, 553 P.2d 1306, 1312 (Idaho 1976) (“Proof of malfunction is circumstantial evidence of a defect in a product since a product will not ordinarily malfunction within the reasonable contemplation of a consumer in the absence of a defect.”). See also *Sochanski v. Sears, Roebuck & Co.*, 689 F.2d 45, 50 (3d Cir. 1982) (“A malfunction is evidence that a defect existed . . .”).

²⁹ OWEN, *supra* note 17, at 450–51 (italics added).

³⁰ *Cf. id.* at 454 (3d ed. 2015) (“it is hornbook law that proof of a product *accident* alone proves neither defectiveness nor causation”).

irreducible prerequisite for, not the analytical output from, the “malfunction theory.”³¹ Both of these errors are easy to make in the obfuscating clutter of a careless invocation of the “malfunction theory.” Simply put, no matter how enticing or empathy-arousing a case’s facts might be (and Ms. Black’s story surely qualifies), every “malfunction theory” analysis must always begin with proof of a product malfunction—that is, the product must have provably “failed.” If that is absent, so too is the “malfunction theory.”

The second attribute of *Black v. DJO Global* that merits notice is how a careful, disciplined application of the “malfunction theory” readily exposes when it is appropriate and when it is not. The Idaho Supreme Court made short work of Ms. Black’s “malfunction theory” contention, concluding that the simple fact that the injury she suffered was “the precise type of injury” known to result from electrical stimulation theory “precludes a jury from inferring that ‘an injury would not have occurred . . . had there not been a defect attributable to the manufacturer.’”³² The conclusion is so obvious because the court returned the discussion back to first principles of “malfunction theory” analysis. Because the “malfunction theory” is merely a substitute path for proving a product’s defectiveness when direct, affirmative proof is unavailable, the inference it permits follows only from (a) proof of a malfunction (the product “failing”), and (b) the absence of proof of any reasonable, other cause for the claimant’s injury.³³ Put another way, no inference is possible if malfunction remains unproved or if reasonable, other causes for injury are obvious. That principled clarity doomed Ms. Black’s claim. A skin burn from an electrode pad wasn’t a malfunction of this product. It was a known and disclosed risk one encounters when using this product. Could that risk have been reduced or avoided by a better product design? Maybe, but that’s not a defect in manufacturing. Could that risk have been warned about in a better way? Maybe, but that’s also not a defect in manufacturing. A defect in manufacturing exists when the product “departs from its intended design.”³⁴ The intended design of this product was to generate electrical stimulation, and that intended function, the user was told, posed a risk of burns. In short, this product behaved in a way both the manufacturer and the therapist understood it might behave. That is not a *mal*-function. Properly understood, the “malfunction theory” is thus quite easy to apply correctly.

The third important attribute of *Black v. DJO Global* is one the opinion did not confront directly but which inescapably underlies its conclusion—the consequence had the ruling been otherwise. When properly applied, the “malfunction theory” will create an inference of defectiveness, but that inference is neither conclusive nor binding. The claimant still always retains the burden of proof to ultimately persuade the factfinder by a preponderance of the evidence that the inferred product defect existed and that its existence caused the injury.³⁵ Had Ms. Black been permitted to use

³¹ See *id.* at 453–54 (“The doctrine presents a seductive but faulty shelter for plaintiffs with insufficient proof of defect and causation, and the law reports brim with decisions that recite the propriety of the doctrine as a general proposition but hold it inapplicable to the facts.”).

³² See *Black v. DJO Global, Inc.*, 488 P.3d 1283, 1288 (Idaho 2021).

³³ See *id.* at 1287.

³⁴ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (1998).

³⁵ See OWEN, *supra* note 17, at 456–57. See also *Sochanski v. Sears, Roebuck & Co.*, 689 F.2d 45, 50 (3d Cir. 1982) (“Evidence of a malfunction . . . is not a substitute for the need to establish that the product was defective. A malfunction is evidence that a defect existed and eliminates only the need to identify a

the “malfunction theory” to infer a defect in the electrode pads in this case (or, more alarmingly, to infer a malfunction of those electrode pads), where would the jury have been left? Self-adhesive carbon electrode pads are known to result in skin burns on occasion. That’s why special care in their use at high current levels was advised. Did that anticipated, conveyed risk cause Ms. Black’s burns? Or had there really been a wiring problem or a pad adhesion issue that triggered those burns? No one will know, least of all the jury. What would result is factfinder speculation based on a guess resting on missing evidence, something the law cannot permit.³⁶ The mischief of such an improper use of the “malfunction theory” is obvious.³⁷

The “malfunction theory” plays an important role in litigating claims over injuries thought to have occurred as a result of a defect introduced during the manufacture of a product. It is a shortcut to proof of liability. That shortcut is fair and, sometimes, irreplaceable. But that shortcut is also dependent upon proof that a malfunction actually occurred. Without that threshold proof, the “malfunction theory” can have no proper place in products liability litigation, as the Idaho Supreme Court in *Black v. DJO Global* correctly reminded us.

specific failure . . . [E]ven when a case is tried under a malfunction theory, recovery rests on a finding that a defect did exist.”).

³⁶ See OWEN, *supra* note 17, at 454 (“[W]hile the malfunction doctrine provides a method for plaintiffs in proper cases to establish defectiveness and causation, the law will not allow plaintiffs or juries to rely on guess, conjecture, or speculation.”).

³⁷ But in case it isn’t, the indomitable Bexis (James M. Beck) once recounted the “ooey gooey” path a misapplication of the “malfunction theory” can travel. See Bexis, *Ooey Gooey*, DRUG & DEVICE LAW BLOG (July 20, 2011), <https://www.druganddevicelawblog.com/2011/07/ooee-gooey.html> (\$18 million verdict without proof of malfunction).